United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-7114

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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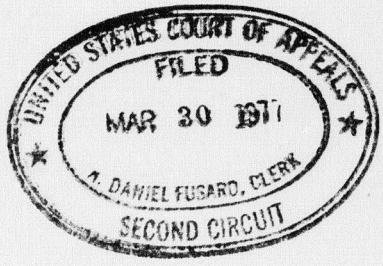
JOSEPH BULLA, ANNY ALTMAN, NATALIE WARTENBERG, SIGMUND RINGER, DORA GOLDMAN, ANNE MORRIS, TERESA TALIERCIO and DOROTHY NIEMITZ, on behalf of themselves and all other persons similarly situated,

Appellants,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York; ROBERT P. WHALEN, as Commissioner of Health of the State of New York; PETER GOLDMARK, as Director of the Budget of the State of New York; and HUGH L. CAREY, as Governor of the State of New York,

Appellees.



B R I E F F O R A P P E L L A N T S

ANDREW P. ZWEBEN
LEGAL SERVICES FOR THE ELDERLY POOR
2095 Broadway
New York, NY 10023
(212) 595-1340

STEPHEN M. JACOBY
AMERICAN JEWISH CONGRESS
15 East 84 Street
New York, NY 10028
(212) 879-4500

Attorneys for Appellants

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STEPHEN M. JACOBY
AMERICAN JEWISH CONGRESS
15 East 84 Street
New York, NY 10028
(212) 879-4500

Attorneys for Appellants

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PRELIMINARY STATEMENT

Appellants are recipients of Medical Assistance (Medicaid) residing in nursing homes in the State of New York. This action was initiated by the named appellants on their own behalf and on behalf of all nursing home patients in New York whose nursing care and services have been reduced by the actions of the appellees.

In their action below appellants seek declaratory and injunctive relief to redress violations of rights secured to them by the due process clause of the Fourteenth Amendment to the Constitution of the United States; by Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq., and certain regulations promulgated thereunder; by the Civil Rights Act of 1871, 42 U.S.C. 1983; by New York State Social Services Law and certain regulations promulgated thereunder; and the New York State Health Code.

Appellants are suffering reductions in the Medical Assistance and are threatened with further reductions affecting their nursing care and services. Appellants' rights have been violated by appellees' actions reducing their Medical Assistance without giving them timely and adequate notice and an opportunity to contest any proposed reduction in their Medical Assistance, and without consultation with and participation of the Medical Care Advisory Committee established as part of the Medicaid program. Appellants'

rights have been violated by appellees' promulgation of a system of reimbursing nursing homes for appellants' care which is arbitrary, capricious, and unreasonable; which is not sufficient to allow for adequate nursing care; which is not reasonably related to the cost of appellants' care; which violates appellants' rights under a contract between the nursing homes in which they reside and the appellees; and which is not designed to enlist participation of providers of nursing home care in the Medical Assistance program.

This action was commenced on February 1, 1977. A proposed Order to Show Cause why a preliminary injunction should not issue, containing a temporary restraining order, was submitted to the Honorable Thomas P. Griesa on February 8, 1977. Judge Griesa rejected plaintiffs' application for a temporary restraining order and, after argument, denied plaintiffs' application for a preliminary injunction affecting the entire class on February 15, 1977. A notice of appeal from the decision of February 15, 1977 was filed on February 23, 1977.

In order to facilitate the consideration by this Court of plaintiffs' appeal, counsel submitted to the lower court a written order embodying the decision rendered from the bench. This submission to the lower court included an application for an injunction pending appeal, in accordance with Rule 8(a) of the Federal Rules of Appellate Procedure.

On February 28, 1977, following a hearing on an application for relief for an individual nursing home, the

Court below again denied plaintiffs' motion for a preliminary injunction affecting the entire class and plaintiffs' application for an injunction pending appeal. At that time Judge Griesa indicated that a written order embodying his decision was not necessary. On March 4, 1977 plaintiffs amended their notice of appeal to reflect the decisions rendered on February 28, 1977.

On March 9, 1977 the appellants moved this Court for an injunction pending appeal pursuant to Rule 8 of the Federal Rules of Appellate Procedure. On March 15, 1977 this Court, by Judges Feinberg, Timbers and Davis, after argument, denied appellants' motion without prejudice to renew before the panel hearing this appeal.

This is an appeal from the decision of the Honorable Thomas P. Griesa of the United States District Court for the Southern District of New York denying appellants' motion for a preliminary injunction for the entire class. This decision was announced from the bench on February 15 and again on February 28, 1977.

ISSUES PRESENTED

WHETHER THE COURT BELOW ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION.

STATEMENT OF FACTS

For a full statement of the facts which led to the commencement of this action, appellants herein respectfully refer the Court to Appellants' Brief of Appeal in the related case of New York Association of Homes for the Aging et al. v. Toia, Docket #77-7102, pages 4 through 23.

THE PROCEEDINGS BELOW

Appellants incorporate herein the evidence and testimony in the proceedings in the District Court in the related case, set forth in pages 23 through 27 of that brief.

Appellants sought preliminary injunctive relief below and in support of that application submitted affidavits of two of the named plaintiffs, the Medical Director and attending physician of Beth Abraham Hospital (a skilled nursing facility) and Andrew Zweben, counsel to the plaintiffs. The latter affidavit incorporated the second supplemental affidavit of Mitchell Waife submitted in the related case, New York Association of Homes for the Aged, et al. v. Toia, et al., 76 CIV 5113 (JA-621).

Anne Morris and Teresa Taliercio, two patients at Beth Abraham Hospital, attested to the minimal conditions already existing at Beth Abraham due to the reductions in personnel already made to accommodate rate reductions.

The effects noted by the patients range from cutting patients off from "religious services, recreation or other

activities" after 4:00 p.m. because there is now no elevator operator after that hour (Affidavit of Anne Morris) (JA-616) to reductions of nursing floor staff so that most patients who must be turned regularly to avoid skin ulcers (decubiti) cannot be turned between 11:00 p.m. and 7:00 a.m. (Affidavit of Teresa Taliercio) (JA-618).

Dr. Walter Schwartz, attending physician of Beth Abraham Hospital, stated that the present staff level at Beth Abraham was barely sufficient to deliver the care and services needed by the patients. Dr. Schwartz stated that the cuts demanded by the Department of Health could not be effectuated consistent with minimum standards of patient care and would result in "the death of many patients and the hopeless deterioration in the health of many others." (Affidavit of Walter Schwartz, ¶10, JA-615)

Dr. Harvey Shapiro, Medical Director of Beth Abraham, concurred with Dr. Schwartz' statement. He stated that any further staff cutbacks, as required by the Department of Health, would result in a disaster threatening the health of every patient and causing the death of many. (JA-613)

These reactions to the cuts recommended by the Department of Health were similar to those of other nursing homes affected. Mohawk Valley Nursing Home of Ilion, New York stated that the reductions:

> ...would reduce the level of patient care to the warehousing of human beings. We cannot, and will not, tolerate Nursing

> Home residents being forced to lay in their own urine and feces because nursing time is not available to promptly care for them. The decubiti caused by this neglect would require further nursing time leading to additional neglect. This multiple compounding of problems is obvious.
> (Exhibit D, to Affidavit of M. Waive, JA-391)

The administration of the Margaret Tietz Center for Nursing Care warned the Department of Health that:

> any reduction in staff rendering direct patient care would prevent the delivery of safe, humane and skilled care to our patient populations.
> (Exhibit C to Affidavit of M. Waife, JA-380)

And the Director of Nursing of the Sephardic Home for the Aged informed the Deaprtment of Health that:

> If I were to implement the substantial cuts in the Nursing Staff recommended by the Hearing Board, I feel the consequences of this act would be devastating to those whose lives have been entrusted to us. If our present standards of care are diluted by the State Board's cuts in personnel, I feel that chaos will be the final result.
> (Exhibit E, of second attachment to Affidavit of M. Waife, JA-399)

The Court below held a hearing on February 28, 1977 at which testimony was heard concerning the conditions at Beth Abraham Hospital. William Frohlich, Administrator of Beth Abraham, testified that on December 4 he laid off 14 nurses aides and orderlies. Following these layoff the home has specifically recorded an increase in the number of skin

ulcers forming on the patients. (JA- 2184, 2186)

The December layoffs were in addition to a cutback of nearly 40 personnel resulting from a job freeze and attrition enacted in response to the freeze of Medicaid rates at the 1975 level. (JA-2181)

The staff directive to cuts at Beth Abraham conflicts sharply with a directive issued by the Health Department in March, 1975 ordering Beth Abraham to hire 63 additional registered nurses. (JA-2173). Because of budget limitations only 11 or 12 of those nurses were actually hired. (JA-2175, 2176)

Donald Davidoff, Deputy Commissioner of the Department of Health, admitted to the Court below that Beth Abraham had been directed to hrie additional nurses and that that mandate had never been withdrawn. (JA-2173, 2198) In fact, Commissioner Davidoff admitted that even as of November 1, 1976, the date on which the statewide budget reductions became effective, Beth Abraham had not been relieved of the responsibility to hire the additional nurses. (JA-2179). Finally, the lower court noted that it could not see how Beth Abraham or any of the homes could immediately respond to the November 1 cuts as demanded by the Department:

> Now, all of a sudden you cut the rates with practically no notice. What are they supposed to do? They are getting $85,000 a month less for November and December, given no notice virtually. I don't see that they can turn around on November 1 and make all these cuts. I don't see how anybody can be expected to do anything to suddenly save $85,000. What is somebody supposed to do?
> (JA-2179, 2180

The Court below was not "satisfied...that the Health Department has intelligently reviewed the Beth Abraham side of the thing." (JA-2195)

Deputy Commissioner Davidoff agreed. (JA-2195)

As a result of this hearing the Health Department agreed to review again the situations existing at Beth Abraham and attempt to reach a compromise concerning its budget. (JA-2197)

The conditions existing at Beth Abraham and the dilemma it faced on November 1, 1976 are not unique. Deputy Commissioner Davidoff admitted, in response to the Court's statement concerning the impossibility of immediate response, "(T)he points you just stated are the dilemmas we faced in each of these cases." (JA-2180)

In response to the lower court's urging to restore Beth Abraham's rate pending the new review Deputy Commissioner Davidoff remarked:

> But we have not, and I certainly would not be in a position to agree to grant that kind of restoration of money to one facility when all the others have exactly the same problem and were even in a more precarious cash position than this one. This facility has testified that they have an increasing backlog in receivables. They are not at the brink of bankruptcy as the others were. I am not for one moment advocating brinkmanship, far from it. But I would be very concerned about the precedent for all the others -- (JA-2203)

THE COURT BELOW ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The Court below erred in refusing to enjoin the appellees from continuing to provide the appellants Medical Assistance benefits at a level below those paid prior to November 1, 1976. Under the facts, circumstances and law applicable to this case, that error was so grievous as to constitute an abuse of the discretion vested in the lower court.

Under the well-settled standards governing preliminary injunction motions in this Circuit (see, e.g., Jacobson & Co. v. Armstrong Cork Co., 2d Cir. Slip Opinion No. 232, decided 1/23/77; Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356 (2d Cir. 1976); Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973)), an injunction should plainly have issued in the Court below.

The appellants demonstrated an overwhelming likelihood of success on the merits. The appellees do not deny that notice of reductions in Medical Assistance and an opportunity for a hearing were not afforded any member of the plaintiff class. Appellees do not deny that they did not consult with the Medical Care Advisory Committee prior to the institution of these reductions.

In failing to give notice or consult with the Medical Care Advisory Committee before implementing the

challenged reductions, the appellees acted in clear violation of the Constitution and federal regulations designed to protect Medicaid recipients against the dangers of hastily conceived cuts on Medical Assistance.

There is no doubt that the State of New York is bound by the regulations issued by the Department of Health, Education and Welfare to govern the operations of programs under the Social Security Act.

"New York State, as a participant in the Medicaid program, must conform to the Social Security Act and all valid regulations promulgated thereunder." Feld v. Berger, 75 Civil 5610 (S.D.N.Y., 1976) citing King v. Smith, 392 U.S. 309, 317, 88 S.Ct. 2128, 2133 (1968); Shea v. Vialpando, 416 U.S. 251, 253, 94 S.Ct. 1746 (1974) (other citations omitted).

A. Appellants Are Entitled to Notice Prior to the Reduction in Their Medical Assistance.

The appellants are recipients of assistance under a program specifically designed to meet their basic or "brute" need for assistance. In recognition of this essential need for the assistance rendered under the program, the Department of Health, Education and Welfare promulgated regulations which require that:

> (4) In cases of intended action to discontinue, terminated, suspend or reduce assistance:
>
> (i) The State or local agency shall give timely and adequate notice,

> except as provided for in paragraphs (a)(4)(ii), (iii), or (iv) of this section. Under this requirement:
>
> (A) "Timely" means that the notice is mailed at least 10 days before the date of action, that is, the date upon which the action would become effective.
>
> (B) "Adequate" means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency hearing, and the circumstances under which assistance is continued if a hearing is requested;
> 45 C.F.R. 205.10(a)(4)

These regulations are applicable to the Medical Assistance program. 45 C.F.R. 205.10(a). These regulations require prior notice to recipients even when reductions in their assistance are part of across-the-board program revisions. Rochester v. Baganz, 479 F.2d 603, 606 (3rd Cir. 1973). That conclusion was based, in part, on the opinion of the Secretary of Health, Education and Welfare:

> The Secretary urges that even in cases of across-the-board reductions such advance notice is necessary, or at least appropriate, for the orderly administration of welfare programs. He urges that in a program designed to meet subsistence needs recipients ought to be informed in advance if their payments are to be cut for any reason, so that they may be able to plan for the cut, and to the extent possible adjust to it. Rochester v. Baganz, supra, at 606.

The Department of Health, Education and Welfare reiterated its position in this matter on January 2, 1976. The HEW Field Staff Information and Instruction Series F8-76-62, Jan. 2, 1976, states:

> Whenever a State intends to take action to discontinue, terminate, or reduce the amount of medical assistance provided eligible individuals,...or to make changes in coverage which would terminate eligibility for some individuals, timely and adequate notice of such intent is required to be sent to all recipients in accordance with 45 C.F.R. 205.10. Because of the consideration being given currently by a number of States with fiscal difficulties to reductions in this Medicaid program, it is important that this step in the process of State plan amendment not be overlooked.
> HEW Field Staff Information and Instruction Series F8-76-62, Jan. 2, 1976, Part IV Fair Hearings at p. 13. (Cited in Virginia Hospital Association et al. v. Kenley, supra, at 10, 11.)

In Rochester the state of Delaware had reduced payments under the state's Aid to Families with Dependent Children (A.F.D.C.) program 11.7% across the board. The Court of Appeals for the Third Circuit held that even under those circumstances prior notice was required by the 45 C.F.R. 205.10(a)(4). Rochester v. Baganz, supra, at 607.

In Robinson v. Maher, Civ. No. H-76-1 C.C.H. Medicare and Medicaid Guide ¶27,707, p. 9051 (D.Conn. 1975), the Court held that 45 C.F.R. 205.10(a)(4) required "timely" and "adequate" notice to recipients of the State of Connecticut's

reduction of certain Medical Assistance benefits to all of the recipients in the state. Robinson, supra at 9052. The reductions at issue in that case were (1) a ten per cent "across-the-board" reduction in the fees paid for most providers of medical services and supplies; (2) the elimination of dental care for recipients 21 years of age and older, except in specified emergencies; (3) the elimination of all optometric and routine podiatry services for recipients 21 years of age and older except for hardship cases; and (4) the complete elimination of all chiropractic and private duty nursing services.

The court in Robinson found that the benefits had "been reduced or terminated without the full ten days notice mandated by federal law, and without the required input of medical professionals and others which might have affected the extent, the categories and the nature of the cutbacks." Medicare and Medicaid Guide at 9053. These departures from the requirements of law established a likelihood of success "strongly in the plaintiffs' favor" and justified the immediate issuance of an injunction. Medicare and Medicaid Guide at 9053.

Likewise, in Wisebacker v. Rhodes, C.C.H. Medicare and Medicaid Guide ¶28,025, p. 10,140 (D.C. Ohio, 1976); Jennings and Kimble et al. v. Solomon, Civ. No. Y-76-210 (D.C. Md. 1976) and Virginia Hospital Association et al. v. Kenley, Civ. Action #76-0300-R (E.D. Va., Richmond Div., 1976)

federal district courts enjoined program-wide reductions in state Medicaid programs until all affected recipients were provided notice of the proposed reductions.

New York State regulations governing the operation of the Medicaid program also require that a Medicaid recipient be given notice prior to any reduction or termination of his or her assistance.

> 358.8 Continutation of assistance payments, medical assistance authorization and food stamp authorization when fair hearing is requested. (a) In cases of any proposed action to discontinue or reduce assistance payments, medical assistance authorization, or authorization for food stamp participation, timely and adequate advance notice thereof detailing the reasons for the proposed action shall be sent to the recipients. Under this requirement:
>
> (1) Timely means that the notice is mailed at least 10 days before the date of action, that is, the date upon which the action would become effective, except as follows: In food-stamp authorization cases, timely means that the expiration of the current certification period occurs within 15 days, in which case, it means the remainder of the certification period.
>
> (2) Adequate advance notice means a written notice that includes details of reasons for the proposed action, explanation of the individual's right to conference, his right to request a fair hearing, and the circumstances under which assistance payments, medical assistance authorization or authorization for food stamp participation is continued if a fair hearing is requested.
> 18 N.Y.C.R.R. 358.8 (emphasis added)

B. The Appellants Are Entitled to a Fair Hearing Before any Reduction of Their Medical Assistance.

(1) Federal regulations require that appellants be afforded an opportunity for a fair hearing prior to any reduction in their Medical Assistance.

Regulations issued by the Department of Health, Education and Welfare require that Medicaid recipients be given an opportunity for a hearing to contest any proposed reduction or termination of assistance.

> (5) An opportunity for a hearing shall be granted to any applicant who requests a hearing because his claim for financial or medical assistance is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance or termination of assistance. A hearing need not be granted when either State or Federal law require automatic grant adjustments for classes of recipients unless the reason for an individual appeal is incorrect grant compuation.
> 45 C.F.R. 205.10(a)5

The regulations also provide that Medical Assistance shall not be reduced until a decision is rendered following a hearing unless a decision is made at the hearing that the sole issue is one of state law or policy or a change in state law or policy. 45 C.F.R. 205.10(a)(6)(i), and 205.10(a)(6)(i)A.

These regulations require that the appellants be given an opportunity for a hearing to contest the reductions in their Medical Assistance before the reductions can lawfully take effect. The reductions at issue in this case were

calculated by the appellee New York State Department of Health pursuant to regulations issued by the Department coincident with the reduced reimbursement rates. Those regulations set forth only the method by which the rates are to be calculated. The regulations themselves do not require "automatic grant adjustments." The regulations merely set forth a new method for calculating Medical Assistance rates. Since there are any number of factual determinations which had to be made, by the appellees, prior to the actual issuance of the new rates, the appellants are entitled to a hearing to contest the correctness of those determinations. See, Almenares v. Wyman, 453 F.2d 1075, n. 3 at 1079 (2d Cir. 1971).

Furthermore, the regulation itself provides that even where "automatic grant adjustments" are required by state law, a recipient has a right to a prior hearing to contest the correctness of the grant computation.

Without limiting future issues it is plain even now that appellees' actions raise several factual questions which are proper subjects of fair hearings. For example, the correctness of the rating for the quality of services rendered by a nursing home in a particular area. Insofar as the reimbursement rate is based on this rating, its correctness is of singular importance. The actual calculation of the size of a particular facility and the calculation of the ceiling for any service are both subject to error. Evidence before the Court below has already indicated that an error was made in the bed count of the Mary Manning Walsh skilled nursing facility. Correction of this error alone increased each patient's benefits fourteen ($14) dollars per day

Similarly, closer examination of the conditions of the patients at any home may well indicate a need to increase the reimbursement ceilings for the patients of that home. Such an examination is presently in progress for the Beth Abraham Hospital and, while it is by no means certain, it appears that the medical and nursing care ceilings will be raised there for this very reason.

(2) Appellants' right to a fair hearing prior to any reduction in their Medical Assistance is constitutionally guaranteed.

The Fourteenth Amendment to the Constitution of the United States provides that no "State shall deprive any person of life, liberty or property, without due process of law."

In Kelly v. Wyman, 294 F.Supp. 893 (S.D.N.Y., 1968) affirmed, sub nom. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970) the 3-judge District Court was faced with the necessity of determining "what minimum procedural safeguards are required here in the context of the welfare system." 294 F.Supp. at 903.

The court concluded that

> To cut off a welfare recipient in the face of this kind of "brutal need" without a prior hearing of some sort is unconsionable unless overwhelming considerations justify it. 294 F.Supp. at 900

and

> the stakes are simply too high for the welfare recipient, and the possibility for honest error

> or irritable misjudgement too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.
> 294 F.Supp. at 904, 905.

The decision of the three-judge District Court that a pre-termination hearing was required was affirmed by the Supreme Court in Goldberg v. Kelly, supra. In so doing the Court held that "(t)he fundamental requisite of due process of law is the opportunity to be heard," 397 U.S. at 267, 90 S.Ct. at 1020, and that in the context of public assistance

> these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.
> 397 U.S. at 266, 267, 90 S.Ct. at 1020.[1]

No statement could more aptly sum up appellants' position here. The appellees have made decisions significantly affecting the appellants' receipt of benefits. Those decisions are replete with opportunity for error and, as

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[1] Goldberg v. Kelly, supra, applies to Medical Assistance benefits. See, Martinez v. Richardson, 472 F.2d, 1121 (10th Cir. 1973); Silvey v. Roberts, 363 F.Supp. 1006 (M.D. Fla., 1973) and to reductions as well as terminations; Almenares v. Wyman, 453 F.2d 1075 (1975).

the evidence presented below demonstrated, the errors of the Department have and can have catastrophic repercussions. It is unconscionable to allow these decisions to be implemented without a full and fair opportunity for review.

The requirements of the federal regulations and the Constitution leave no room for discretionary action on behalf of appellees. The regulations are quite specific. They list the circumstances in which notice and a hearing are required. They detail the type and content of notice required under differing circumstances and the allowable exceptions to those requirements. Finally, the regulations specify the type of hearing required and the circumstances under which aid must be continued pending the hearing or the decision following the hearing.

These regulations embody the due process protections which the Supreme Court has held must be afforded public assistance recipients before their aid can be terminated or reduced. (See 45 C.F.R. 205.10(a).)

The appellees have violated every aspect of the appellants' due process rights as afforded by the Constitution and the applicable regulations. The appellants were not given notice of the ratings given to the homes in which they are patients, nor were they given notice that the amount of their Medical Assistance would be based on the ratings of the homes. The appellants were not given notice of the "freeze" of 1976 reimbursement rates at the 1975 level. They were not given notice of the promulgation of Parts 88 and

86.2 of 10 N.Y.C.R.R. or the reductions in their Medical Assistance affected on November 1, 1976. Needless to say, the appellees did not afford the appellants an opportunity for a hearing to contest the reduction in their Medical Assistance. Appellees' actions, or rather their omissions, demonstrate an alarming and blatant disregard of the appellants' constitutional rights.

C. Defendants' Reduction of Plaintiffs' Medical Assistance Without the Participation of the State Medical Care Advisory Committee Violates Plaintiffs' Rights Under the Social Security Act and Regulations.

Federal Medicaid regulations require that each state operating a Medicaid program establish a Medical Care Advisory Committee that will "have adequate opportunity for meaningful participation in policy development and program administration..." 45 C.F.R. §246.10(a)(3). New York Social Services Law §365-c(1) establishes the Medical Care Advisory Committee in New York. Social Services Law §365-c(2) provides that the Committee shall advise the Commissioner (of Social Services) with respect to health and medical care services provided by the Medical Assistance Program.

The appellees are required by these regulations to submit a proposal to reduce appellants' Medical Assistance to the Medical. Care Advisory Committee so that the Committee can advise and participate in the proposed actions. Wisebacker v. Rhodes, supra, at 10,143; Robinson v. Maher, supra, at 9052, 9053.

This is by no means a frivolous requirement. As the District Court in Robinson stated:

> It may well be that such a consultation with practicing physicians, other health care professionals, and representatives of groups of health service consumers who are on that committee, 45 C.F.R. §246.10(a)(2)(i)-(ii), might suggest to the commissioner alternative ways to reduce expenditures, in a manner which would not diminish the availability or the quality of health services for the needy, thus avoiding unnecessary hardship. Robinson, supra at 9053.

In both Wisebacker and Robinson, the federal courts enjoined the effectuation of Medicaid program cutbacks until the states involved complied with the requirements of federal law and allowed full and meaningful participation of the Medical Care Advisory Committee.

It is undisputed that the reductions in appellants' Medical Assistance were not submitted to the state's Medical Care Advisory Committee for its advice or participation. Thus another of the protections which federal regulations afford the appellants to protect them from ill-advised reductions in their Medical Assistance was indisputably ignored by the appellees. This is yet another incontestable violation of appellants' rights which was before the Court below.

D. A Preliminary Injunction Is Necessary to Prevent Irreparable Injury to the Appellants.

In Sonesta International Hotels Corp. v. Wellington Associates, 489 F.2d 247 (2d Cir., 1973) this Court held that a preliminary injunction should issue on a showing of either:

> (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.
> 483 F.2d at 250 (emphasis in original)

Accord: Jacobson & Co., Inc. v. Armstrong Corp., 2d Cir., Slip Opinion No. 232, decided 1/23/77 at 1156; Triebwasser & Katz Brands, Inc. v. Playgirl, Inc., 498 F.2d 947 (2d Cir. 1974); Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co., 476 F.2d 687, 692-93 (2d Cir. 1973); Checker Motors Corp v. Chrysler Corp., 405 F.2d 319 (2d Cir.), cert. denied, 394 U.S. 999 (1969).

Appellants have established a strong likelihood of success on the merits of their action. The appellees failed to accord appellants any element of the due process protections required by the Constitution and the federal regulations governing the Medicaid program. In addition, the appellees violated the command of the Medicaid regulations by failing to consult with the Medical Care Advisory Committee prior to the institution of the reductions. Wholly aside from appellants' other causes of action these will support a

judgment on their behalf. Appellants have thus fulfilled the first prong of the first test required by this Court's holding in Sonesta, supra.

Appellants have presented considerable evidence that appellees' action will result in "possible irreparable injury." As the evidence demonstrates this injury is not speculative nor is appellants' fear unfounded.

A continuation of the present reduced Medicaid rates will necessitate additional cuts in the services rendered to the members of the appellant class. A final judgment may well restore the appellants' Medical Assistance Benefits to their previous level, but it cannot replace the services not rendered during the course of the litigation. All appellants will be able to expect is a return to prior service levels. The clock cannot be turned back.

The Court below had before it evidence that the December layoffs at Beth Abraham had already resulted in an increase in decubiti forming in the patients of that institution. And these layoffs were a fraction of those cuts which would be necessary to allow Beth Abraham to provide appellants nursing care at the reimbursement rate presently paid on appellants' behalf.

In addition to this dramatic evidence of actual injury already suffered, Drs. Schwartz and Shapiro both swore that the additional reductions in services required would result in the death of some patients and the deterioration of others.

Other evidence before the Court established that the situation at Beth Abraham was not unique. The financial instability of many homes, ample evidence of which the Court heard in testimony, seriously threatens the appellants herein. Should the vendors of food or services, whose accounts receivable are three or four months overdue, cease to do business with the homes, chaos would result. Thus appellants could be deprived of food and necessary medical supplies and care.

More compelling, however, was the evidence that the reductions in staff and services necessitated by the reduction in appellants' Medical Assistance will, in the opinion of the professionals operating the nursing homes, leave patients lying "in their own urine" and "prevent the delivery of safe, humane and skilled care." (See Exhibits C & D to affidavit of M. Waife, JA-391, 380)

It requires a suspension of common sense to fail to see how the reduction of services to patients in a nursing home will result in irreparable injury to those patients.

The Court below denied the appellants' motion for a preliminary injunction for the class apparently on the basis that "the situation as to each home has its particular facts." (JA-2215) While it may be true that the facts or circumstances differ from nursing home to nursing home those differences in no way support the lower court's denial of preliminary injunctive relief to the entire class.

The procedure established by the lower court is

simply not workable in the context of this case. Rather than grant relief to the entire class of plaintiffs Judge Griesa offered to hear individual cases of hardship and rule thereon.

Unfortunately, the members of the appellant class still have no notice of their legal rights. They have no notice of this proceeding or Judge Griesa's offer to hear of their plight. When counsel sought permission to contact the members of the class to so inform them, permission was refused.

Even were they able to take advantage of the procedure suggested by the Court below, the experience of this litigation and the vast number of persons affected would make individual applications for emergency relief not merely impracticable but impossible. So the members of the class remain helpless.

This situation is totally unjustified and unjustifiable. Every member of the plaintiff class has been subjected to the same inequity. It is undisputed that no member of the appellant class was given notice of the rating system, the reduction in his or her Medical Assistance or an opportunity for a hearing to contest these cuts. The state has admitted that the reductions were not submitted to the state's Medical Care Advisory Committee for its review.

The experience of this litigation and the related case indicate that substantial errors have been made by the Department of Health in its estimates of the health care needs of the appellants. Furthermore experience has shown that the review process necessary to accurately assess the situation at

at every home is lengthy and complex.

Every member of the class is subject to the injury which has or can be caused by appellees' actions. That the degree or extent of that injury is not identical does not justify a denial of relief.

The existence or probability of injury was well known to the appellees and the Court below. At the hearing of February 28, 1977 Donald Davidoff, deputy commissioner of the Department of Health, refused Judge Griesa's suggestion that Beth Abraham's Medicaid rate be reinstated to the pre-November 1, 1976 level pending the outcome of the review process. In so doing he told the Court that to do so would set a precedent since "all the others have exactly the same problem and were even in a more precarious cash position than this one." (JA-2203)

In referring to the situation at Beth Abraham Judge Griesa urged the Health Department to take "a close look at what these doctors say about the need for a lot of care to insure cleanliness and decency and some proper protection against disease and death and any more suffering that I am already sure they are going through." (JA-2209)

And finally Judge Griesa stated:

> No, as far as the timing -- look, I regret any suffering of anybody for a day. But I just think that I cannot -- I have no power realistically and legitimately to suddenly say, oh, I have got to do it today rather than next week. I must tell you that what I think will go on in connection with the Beth Abraham Home is the only thing I

> can expect. If it take a week or ten days, it just has to do that. That is one of the necessities of life. (JA-2214)

So the Court below was fully aware of the injury facing the appellants. In fact, Judge Griesa indicated that he was sorry for any injury suffered by any member of the appellant class. Yet, either because he felt legally constrained or for some other reason, he failed to grant relief.

Appellants respectfully urge that under these circumstances there was no discretion in the lower court to deny relief to the appellant class, particularly in light of the denial of their constitutional rights and the immediate threat to their health and lives.

CONCLUSION

The denial of the preliminary injunction by the Court below was an abuse of discretion and should be reversed.

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Respectfully submitted,

ANDREW P. ZWEBEN
LEGAL SERVICES FOR THE ELDERLY POOR
2095 Broadway
New York, New York 10023
(212) 595-1340

STEPHEN M. JACOBY
AMERICAN JEWISH CONGRESS
15 East 84 Street
New York, New York 10028
(212) 879-4500

Attorneys for Appellants